IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~65~~ 2

JAMES MARCHETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the U. S. Court of Appeals for the Second Circuit is reported, *sub nomine, United States* v. *Costello, et al.*, 352 F. 2d 848 (2 Cir. 1965) (R. 16-21).[1] The opinion of the court of appeals in a related case, referred to in the *per curiam* denial of the petition for rehearing, is reported

[1] References are indicated as follows:

References to the numbered pages of the appendix to this brief (a).

References to the numbered pages of the Transcript of Record in *Costello* v. *United States*, No. 41, this Term (R.).

References to the numbered pages of the Government's brief in *Costello* v. *United States*, No. 41, this Term (Govt. Br.).

References to the numbered pages of the Government's brief in *Grosso* v. *United States*, No. 181, this Term (Govt. Br., Grosso v. U. S.).

as *United States* v. *Grassia,* 354 F. 2d 27 (2 Cir. 1965) (13a).

Jurisdiction

The judgments of the court of appeals were entered on October 29, 1965 (R. 29). A timely petition for rehearing was denied on November 26, 1965 (R. 31). The petition for a writ of certiorari was filed on December 15, 1965, and was granted on January 9, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented

This Court limited its grant of certiorari to the following question:

> "Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court especially in view of its recent decision in Albertson vs. Subversive Activities Control Board, 382 U. S. 70 (1965), overrule United States vs. Kahriger, 345 U. S. 22 (1953) and Lewis vs. United States, 348 U. S. 419 (1955)?"

Constitutional and Statutory Provisions Involved

Petitioner maintains that the judgments of the court below, affirming his convictions for violations of the wagering tax laws and the federal conspiracy statute, violate his rights under the Fifth Amendment of the United States Constitution. This constitutional provision, as well as

wagering tax laws involved, 26 U. S. C. §§4401, 4411 and 4412, and the general internal revenue statutes and regulations relative to petitioner's claim are set forth in the appendix to this brief (1a-6a).

Statement

Petitioner faces a one-year prison sentence and a $10,000 fine for conviction in the United States District Court for the District of Connecticut on two indictments charging willful violations of the wagering tax statutes and the federal conspiracy statute (7a, R. 1). One indictment charged a conspiracy among petitioner and co-defendants Costello and Gjanci willfully to fail to pay the special wagering occupational tax imposed by 26 U. S. C. §4411 (R. 1). The second indictment, in two counts, charged the willful failure to pay the special occupational tax, required by 26 U. S. C. §4411, and the willful failure to register, required by 26 U. S. C. §4412 (7a).

After verdict, petitioner moved to arrest judgment, claiming, *inter alia*, that the statutes providing for the special wagering occupational tax and registration violated his Fifth Amendment privilege against self-incrimination (R. 5-9). The trial court denied the motion and imposed a one-year prison sentence and a $10,000 fine upon petitioner (9a-11a).

On appeal the court below affirmed, holding that the claim with respect to the self-incrimination clause was controlled by *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 348 U. S. 419 (1955). On petition for rehearing, the court of appeals denied relief, but noted, by reference to *United States* v. *Grassia*, 354 F. 2d 27 (2

Cir. 1965), that while "the rationale of *Albertson* . . . may lead the Supreme Court to overrule its previous decisions in . . . *Kahriger* . . . and . . . *Lewis,* insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination" (14a).

This Court originally granted certiorari to review the issue involved here in *Costello* v. *United States,* No. 41, this Term, and upon Costello's death, the petition for a writ of certiorari in this case, which was filed December 15, 1965, was granted, limited to the question as originally framed in the *Costello* case.

Summary of Argument

This brief is, in effect, a reply to the Government's brief in *Costello* v. *United States,* No. 41, this Term, which the Court has held in abeyance because of the death of Costello. Relying upon the main brief filed in *Costello,* petitioner submits this three-fold response to the Government's position:

1. The Government has failed to justify the *Kahriger-Lewis* doctrine—a judicial aberration in the development of the privilege against self-incrimination—and a doctrine this Court now desires to review. Under cases both before and after *Kahriger* and *Lewis,* the statutory scheme here involved violates the Fifth Amendment privilege.

2. The Government proposal that the Court fashion an exclusionary rule similar to the one announced in *Murphy* v. *Waterfront Commission,* 378 U. S. 52 (1964), in the event *Kahriger* and *Lewis* are abandoned, ignores the pronounce-

ment in *Murphy* that the remedy only has application when a state has granted immunity. Moreover, the Government's proposed remedy constitutes a dilution of the privilege—a dilution it purports to justify on the premise, rejected by this Court, that the privilege has less force when written, as opposed to oral, inquiry is made.

3. The Government's strained contention that petitioner's convictions should be affirmed is inconsistent with the very *Murphy* type remedy it espouses. In *Murphy*, the recalcitrant witness's contempt conviction was reversed in view of the altered scope of the privilege announced in *Murphy*. Even under the restricted *Murphy* rationale, then, there is no justification for affirming petitioner's convictions.

ARGUMENT

I.

By its limited, but specific grant of certiorari, this Court has called for a reevaluation of *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 348 U. S. 419 (1955), which upheld against Fifth Amendment objection the occupational tax on wagering and the accompanying registration provision. 26 U. S. C. §§4411, 4412. The Government's argument, however, avoids the precise inquiry this case presents, but *restates*, without reevaluation, the *Kahriger* and *Lewis* holdings, now here for review.

In an effort to uphold the wagering tax statutes involved, the Government takes a twofold position: First, it argues that payment of the special occupational tax and the accompanying registration are prospective only and, therefore, non-compulsory (Govt. Br. 14-15), which, to be sure,

is the teaching of *Kahriger, supra,* 345 U. S. at 32, and *Lewis, supra,* 348 U. S. at 422. Second, it urges that *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1966), is distinguishable and does not undermine the *Kahriger-Lewis* doctrine (Govt. Br. 15). Most significantly, however, the Government refrains from (1) measuring the *Kahriger-Lewis* doctrine against the scope of the privilege, as defined both before and after *Kahriger* and *Lewis* and (2) examining the sole cited authority in *Kahriger*—a single citation to Professor Wigmore's treatise—for the proposition that the privilege relates only to past acts. The twofold review which the Government fails to make calls for a reversal of *Kahriger* and *Lewis. Albertson,* faultily distinguished by the Government, reinforces that conclusion:

1. The Government completely refrains from measuring the *Kahriger-Lewis* doctrine against the scope of the privilege, as defined prior to and since *Kahriger* and *Lewis.* From the first influential construction of the privilege by Chief Justice John Marshall on circuit, *United States* v. *Burr,* 25 Fed. Cas. (No. 14692e) (C. C. Va. 1807), to this Court's most recent pronouncements, *Malloy* v. *Hogan,* 378 U. S. 1, 12 (1964); *Albertson* v. *Subversive Activities Control Board, supra,* 382 U. S. at 78, the doctrine has been firmly fixed that the privilege "not only extends to answers that would in themselves support a conviction . . . , but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute." *Hoffman* v. *United States,* 341 U. S. 479, 486 (1951). *Kahriger* and *Lewis,* grounded on the notion that representations of intent to engage in criminal activity do not incriminate, flout that link-in-the-chain principle so otherwise well established in constitutional doctrine.

Even assuming, *arguendo,* that the wagering tax statutory scheme relates to future intent only, the disclosed intent most certainly qualifies as at least a link-in-the-chain of evidence that could lead to a prosecution for both federal and state crimes. In fact, compliance with the wagering tax statutes here involved has been utilized to incriminate defendants in both federal and state prosecutions:

In *Acklen* v. *State of Tennessee,* 196 Tenn. 314, 267 S. W. 2d 101 (1954), the defendant was convicted of conspiracy to violate a state gambling statute on the ground that he had complied with the statutes here involved.

In *Irvine* v. *California,* 347 U. S. 128, 130 (1954), the defendant was convicted of violating a California gambling statute, partly upon evidence that he had complied with the statutes here involved.

In *Deitch, et al.* v. *City of Chattanooga,* 195 Tenn. 245, 258 S. W. 2d 776, 777 (1953), the defendants were convicted of gaming and possession of gaming devices, on the basis that they had applied for and possessed federal wagering stamps and had paid the 10 per cent excise tax.

In *State* v. *Curry,* 91 Ohio App. 1, 109 N. E. 2d 298 (1952), the defendant was convicted of engaging in gambling for a living and being a common gambler after receipt in evidence of his special tax return and application for registry. Against the defendant's claim that the return was "merely an expression of intent to perform an illegal act in the future," the Ohio court noted:

> "[it] is admissible in evidence as bearing upon the question of the intent of the accused, upon the theory that a subsequently intended course of conduct showing a then existing state of mind is admissible in evidence

from which the inference may be drawn of a previous intention to pursue a similar course of conduct, where coupled with proof of prior conduct (possession on numerous occasions of illegal lottery slips) tending to prove the offense charged . . . [and to show] . . . 'motive, intent.' . . . ." 109 N. E. 2d at 301.

In *Commonwealth* v. *Fiorini,* 202 Pa. Super. 88, 195 A. 2d 119 (1963), the defendant was convicted of being concerned in the operation of a lottery after his federal wagering tax stamp was introduced in evidence against him.

In *State* v. *Mills,* 229 La. 758, 86 So. 2d 895 (1965), *cert. den.* 352 U. S. 834 (1956), the defendants were convicted of gambling, after the applications for the wagering tax stamp were introduced against them.

In *Grigsby* v. *Mitchum,* 191 Kan. 293, 380 P. 2d 363 (1963), *cert. den.* 375 U. S. 966 (1963), a city ordinance prohibiting the issuance of a pinball license to one who had paid the current $250.00 federal occupational tax and requiring the revocation of such a license if issued, was sustained against constitutional attack.

In *McClary* v. *State of Tennessee,* 211 Tenn. 46, 362 S. W. 2d 450 (1962), the defendant's conviction for professional gambling was sustained, in part on the ground that his purchase and possession of a federal wagering tax stamp raised "a presumption of gambling during the period covered by such a stamp. . . ." 362 S. W. 2d at 454.

In *State of Louisiana* v. *Reinhardt,* 229 La. 673, 86 So. 2d 530 (1956), the defendant was convicted of conducting a lottery, after the admission of evidence that the defendant had purchased a federal wagering stamp.

In *State of Louisiana* v. *Forsyth,* 229 La. 690, 86 So. 2d 536 (1956), the defendant's convictions for gambling and operating a lottery were based in part upon his federal wagering tax records.

And in *United States* v. *Zizzo,* 338 F. 2d 577, 580 (7 Cir. 1964),[2] the defendant was convicted of traveling in interstate commerce with intent to carry on gambling in violation of 18 U. S. C. §1952, partly upon evidence of compliance with the statutes here involved.

2. Nor does the Government in any way justify the sole authority cited as the foundation in *Kahriger, supra,* 345 U. S. at 32, and relied upon in *Lewis, supra,* 348 U. S. at 422, that the privilege has relation only to past acts, not to future acts that may or may not be committed. The only authority is the citation to Professor Wigmore's work. 8 Wigmore, EVIDENCE §2259 (c) (3d. ed. 1940). Of this Wigmore principle, Professor Morgan said prior to *Kahriger* that only a strained reading can

> "... save the generalization from absurdity ... [and that] no court has formulated or adopted such a generalization." Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1, 37 (1949).

3. The Government's attempt to avoid the impact of *Albertson* is misplaced:

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[2] *Zizzo* belies the Government's claim that the wagering tax statutes "do not conflict with the Fifth Amendment in places where gambling is lawful" (Govt. Br. 12), for it establishes that the admissions required can be used in federal prosecutions. Other federal crimes, besides the anti-racketeering statute involved in *Zizzo,* are 18 U. S. C. §1084 (transmission of wagering information), §§1301-1305 (lotteries) and §1953 (interstate transportation of wagering paraphernalia).

First, argues the Government, the voiding of the registration requirement in *Albertson* was somehow brought about or motivated by First Amendment considerations (Govt. Br. 8). Such a reading of *Albertson,* however, ignores the Court's specific refusal to extend its grant of certiorari to the First Amendment issue framed. 382 U. S. at 74, n. 6.

Second, contends the Government, the abridgement of the privilege against self-incrimination is somehow justified when a "countervailing constitutional interest is involved" such as the collection of the wagering tax (Govt. Br. 16). Leaving to one side the miniscule relationship of the wagering tax to the national fisc, this Court has made it clear that the Fifth Amendment affords "a witness the right to resist inquiry in all circumstances . . ." even if the Government is seeking his testimony in the name of "self-preservation, 'the ultimate value of any society.'" *Barenblatt* v. *United States,* 360 U. S. 109, 126, 128 (1959). Nothing in *Albertson* remotely suggests the contrary.

Even assuming, *arguendo,* that the judicial balancing technique the Government urges were justified—and petitioner maintains that no such policy is warranted—this is hardly the tax which would require the limiting of the privilege. The "substantial governmental interest . . . [in] the collection" of the tax (Govt. Br., Grosso v. U. S. 26) is not applicable here. In testifying before a Senate committee in 1961, former IRS Commissioner Caplin first noted eight reasons for the Service's opposition to the wagering taxes. Among the reasons were: (1) they involve the Service in what are "essentially police procedures distinct from revenue collections," (2) they are virtually "unenforceable as a practical matter," (3) their enforcement

would require additional manpower "greatly out of proportion to the revenue to be derived," and (4) they might cause gambling operators to "evade income taxes as well as the wagering taxes." Then the following colloquy occurred:

> "The Chairman. In other words, in this effort under existing laws to collect the tax, it costs more to collect it than that which you are able to collect?
>
> "Mr. Caplin. Yes, sir." *Hearings Before the Permanent Committee on Investigations of the Committee on Government Operations* (U. S. Senate, 87th Cong., 1st Sess., Part I, August 23, 1961, pages 94, 95-96).

Third, says the Government, the "new" wagering tax form, Form 11-C, injected in this case for the first time at this stage (Govt. Br. App.), asks questions which are "at most equivocal" and more related to future activity than the form in *Albertson* (Govt. Br. 14, 15).[3] But the "new" Form 11-C asks, in question 5(b), for example, for the number and name of each person "*engaged* in receiving wagers on your behalf." This is hardly an inquiry directed to the future; it certainly calls for answers as incriminating as the questions propounded in the *Albertson* form. Here, as in *Albertson*, "the risks of incrimination . . . are obvious." 382 U. S. at 77.

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[3] This "new" Form 11-C was not available when petitioner filed his motion in the trial court (R. 6) and apparently was still unavailable when the Government, in January 1966, filed its brief in opposition to the petition for certiorari (Govt. Br. in Opposition, Appendix) in this case. At any rate, the old form was in use at the time relevant to this prosecution. Moreover, both forms run afoul of this Court's Fifth Amendment command which bars all inquiries, except those which cannot possibly have such tendency to incriminate. *Malloy* v. *Hogan*, *supra*, 378 U. S. at 12.

In the context of the wagering tax statutes, the privilege against self-incrimination—which this Court has recognized as " 'one of the great landmarks in man's struggle to make himself civilized,' " *Ullmann* v. *United States,* 350 U. S. 422, 426 (1956)—stands stained by the rationale of *Kahriger* and *Lewis.* In accordance with this Court's mandate that the privilege "must be accorded liberal construction in favor of the right it was intended to secure," *Hoffman* v. *United States, supra,* 341 U. S. at 486, petitioner urges that *Kahriger* and *Lewis* be overruled.

II.

In the major portion of its brief, the Government argues that, if *Kahriger* and *Lewis* be reversed, the proper remedy is for this Court to uphold the wagering tax, but bar further use of information acquired in the enforcement of wagering tax statutes (Govt. Br. 19-27). Ignoring a whole host of decisions holding that the right to silence is the remedy for proper invocation of the privilege, the Government urges the creation of an imprecise exclusionary rule recognized in *Murphy* v. *Waterfront Commission, supra,* 378 U. S. at 79.

Murphy, to be sure, did provide for a rule of exclusion, but the Court invoked this remedy only because it had to "decide what effect . . . [abrogation of the dual sovereignty doctrine] has on *existing state immunity legislation.*" 378 U. S. at 78 (emphasis added). Since it was well recognized that states could not grant immunity from federal prosecution, *United States* v. *Murdock,* 284 U. S. 141, 149 (1931); *Jack* v. *Kansas,* 199 U. S. 372, 380 (1905), a ruling in *Murphy* that a witness could remain silent because of fear of federal prosecution after a grant of immunity by

a state would have, in effect, repealed all state immunity statutes. Sobel, *The Privilege Against Self-Incrimination 'Federalized'*, 31 BROOKLYN L. REV. 1, 46 (1964). But to have held, on the other hand, that a purported grant of immunity by states must have extended, in view of the elimination of the dual sovereignty rule, to federal prosecution would run afoul of the supremacy clause.[4] In order to accommodate both the constitutional privilege and the constitutional provision regarding federal supremacy, and to salvage the state immunity statutes, the Court fashioned the *Murphy* remedy of immunity from use. But, there being no state immunity legislation to salvage here, there is no justification for applying the *Murphy* remedy.

That the *Murphy* remedy is inapplicable except when a state immunity statute is involved is clear from both *Malloy* v. *Hogan, supra,* and *Albertson* v. *Subversive Activities Control Board, supra.* In *Malloy,* decided the same day as *Murphy,* and in *Albertson,* where no state immunity statutes were involved, this Court upheld the Fifth Amendment right to remain silent. If the Government's contention here be sound, *Malloy* and *Albertson* were wrongly decided: (1) *Malloy,* under the Government's notion, should have provided for compelled testimony on remand and immunity from use of the testimony disclosed, and (2) *Albertson,* under the Government's view, should have provided for compelled registration with the proviso that the informa-

[4] "If a state were allowed to grant immunity from federal prosecution, federal authorities would be vulnerable to severe restrictions on their activities. Since the federal government could have no check on state grants of immunity, corruption and 'immunity baths' could easily result." Note, *Counselman, Malloy, Murphy, and the State's Power to Grant Immunity,* 20 RUTGERS L. Rev. 336, 345-346 (1966).

tion disclosed could not be used against the registrant. But, as noted, there is no gainsaying the fact that this Court in *Murphy* and *Albertson* did not do this.

The Government attempts to distinguish *Albertson* because the registration in *Albertson* did not secure information necessary for law enforcement (Govt. Br. 22; Govt. Br., Grosso v. U. S. 26). But certainly that claimed distinction does not explain *Malloy* where Connecticut sought information concerning gambling. 378 U. S. at 3.

The Government does not, and indeed, cannot cite any authority for the proposition that in the absence of full immunity the proponent of a proper use of the Fifth Amendment privilege can be forced to respond to inquiry propounded by any agency of the United States or, in the alternative, face punishment.[5] The Government rule now proposed would bring about such a result and dilute the doctrine established in *Counselman* v. *Hitchcock*, 142 U. S. 547, 585 (1892), that no ruling "which leaves the party . . . subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege."

The Government is quick to assert that it does not contemplate immunity from prosecution as a part of its proposed, judicially created remedy (Govt. Br., Grosso v. U. S. 20). It rightly recognizes that immunity is a matter of

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[5] As the Government virtually concedes, neither the coerced confessions nor *Miranda* situations are pertinent, since once the silence has been broken and evidence obtained, the Court can, "as a practical matter, focus only upon the point of attempted use" (Govt. Br. 20). The traditional right to remain silent can not be observed after this type of Fifth Amendment violation.

legislative concern (Govt. Br., Grosso v. U. S. 21).[6] It follows, therefore, that what the Government really urges is a *sub silentio* rejection of the *Counselman* doctrine that the Fifth Amendment assures the right to silence unless there is full-scope immunity. Yet this Court has consistently applied the *Counselman* doctrine. *Brown* v. *Walker,* 161 U. S. 591, 610 (1896); *Ullmann* v. *United States, supra,* 350 U. S. at 430-1; *Reina* v. *United States,* 364 U. S. 507, 514 (1960).

In *Brown, Ullmann,* and *Reina* the Court authorized abandonment of the witnesses' Fifth Amendment right to silence only after recognizing that the immunity statutes involved were coextensive with the Fifth Amendment.

Moreover, in *Albertson,* decided after *Murphy,* the Court reiterated the need for a grant of *absolute immunity* against future prosecution as a condition precedent to compelling a witness to abandon his right to remain silent if he fears incrimination. 382 U. S. at 80.

The Government, in promoting the exclusionary rule, establishes a "use point"–"compulsion point" dichotomy (Govt. Br., Grosso v. U. S. 24) and suggests that only if a witness is testifying orally is the protection of the priv-

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[6] This recognition also destroys the Government's heavy reliance on *United States* v. *Blue,* 384 U. S. 251 (1966). It is difficult to see how the Government claims that the Court's failure to sustain the dismissal of the *Blue* indictment justifies an exclusionary rule in this case (Govt. Br. 21). *Blue* can not be said to stand for the rejection of the need for a legislative, full grant of immunity prior to the compulsion of a response to official inquiry. Contrary to the Government's assertion, it shows no selection for the "use point" over the "compulsion point" (Govt. Br. 21). Rather, the *Blue* situation is akin to the coerced confession and *Miranda* situations, where violation of the traditional Fifth Amendment silence has already occurred.

ilege "appropriately invoked" at the compulsion point (Govt. Br., Grosso v. U. S. 13-14). Here again, this view has been rejected by *Albertson*:

> "These cases involved questions to witnesses on the witness stand but if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." 382 U. S. at 78.

The *Murphy* exclusionary rule, then, fashioned to protect immunity statutes not here involved, cannot be applied here without dilution of the privilege. The Government argument to the contrary ignores, *inter alia*, the *Malloy* case, decided with *Murphy*, and is based upon a false distinction between oral and written inquiries.[7]

III.

In urging an exclusionary rule, the Government places prime reliance on *Murphy*. Yet it denies to petitioner the benefits of the disposition there (Govt. Br. 26). If the Government's exclusionary rule were accepted, then by hypothesis, the privilege has been violated and a new remedy is to be fashioned: the exclusion of the use of information acquired by the compliance with the wagering tax statutes.

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[7] And the Government appears to shy away from the obvious implication of its proposed exclusionary rule. After being ordered to express its views on a case where a defendant was convicted, at least partially upon proof of registration under the federal tax laws, the Government refuses to "suggest a disposition" (Memorandum for U. S., *Rainwater* v. *Florida*, No. 555, this Term, *certiorari* pending, p. 3), apparently having second thoughts about the effect of its proposal on federal-state relations.

But neither petitioner, nor the witness in *Murphy,* had reason to anticipate such a result. The key point in time is that of the alleged offense. At that time, petitioner had every reason to fear that he would incriminate himself by complying with the wagering tax laws. He had no reason to believe that compliance, followed by a challenge to the use or admissibility against him of the registration information would provide a more fruitful line of attack. *Irvine* v. *California, supra.* It is difficult to see how the Government can reasonably argue that one faced with the dilemma of self-incrimination should go free if he chose successfully to challenge *Irvine,* but that his conviction should stand even though he successfully challenged *Kahriger* and *Lewis.*

Even if the Court is now to adopt the *Murphy* rationale, it must, in fairness, reverse petitioner's convictions. Certainly, the label of civil contempt, which the Government relies upon in a footnote (Govt. Br. 26), should be of no import.

Conclusion

Analysis of the wagering tax scheme here under review indicates that it can have no other tendency but to incriminate those who comply with it. *Kahriger* and *Lewis*—strikingly to the side of the mainstream of Fifth Amendment doctrine—should be overturned in recognition of this fact. The *Murphy* type exclusionary rule the Government requests is not an appropriate substitute for the right to remain silent. But even if it were it could not justifiably be applied to sustain petitioner's convictions.

For these reasons, then, the judgments of the court below should be—and petitioner requests that they be—reversed with directions to enter judgments of acquittal.

Respectfully submitted,

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January 13, 1967.

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APPENDIX

Constitutional Provisions, Statutes, and Regulations Involved

Amend. V, U. S. Const.: *Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

68A Stat. 525 (1954), 26 U. S. C. §4401 (1958): *Imposition of tax*

(a) Wagers—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a

separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U. S. C. §4411 (1958): *Imposition of tax*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U. S. C. §4412 (1958): *Registration*

(a) Requirement—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes

him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 528 (1954), 26 U. S. C. §4422 (1958): *Applicability of federal and state laws*

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

68A Stat. 528 (1954), 26 U. S. C. §4423 (1958): *Inspection of books*

Notwithstanding section 7605(b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

68A Stat. 593 (1954), 26 U. S. C. §4901 (1958): *Payment of tax*

(a) Condition precedent to carrying on certain business.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461(2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) How paid.—

(1) Stamp.—All special taxes imposed by law shall be paid by stamps denoting the tax.

68A Stat. 732 (1954), 26 U. S. C. §6011 (1958): *General requirement of return, statement, or list*

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person

made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

68A Stat. 851 (1954), 26 U. S. C. §7203 (1958): *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 C. F. R. §44.4412-1 (Relevant Portions)

. . .

(b) . . .

(2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter,

a return shall be filed on Form 11-C, marked "Supplemental", each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see § 44.4905-2.

(3) Each agent or employee who receives wagers for or on behalf of a person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and residence address of each person (i.e., individual, partnership, corporation, etc.) on whose behalf wagers are to be received. Thereafter, the agent or employee shall file a return on Form 11-C, marked "Supplemental", each time he is engaged or employed to receive wagers for a person or persons other than the person or persons previously reported on Form 11-C. Such supplemental return shall be filed not later than 10 days after the date he is engaged to receive wagers and shall show the name, business address, or, if none, the residence address of the person or persons by whom he is engaged to receive wagers.

. . .

Indictment [No. 11,270]

The Grand Judge Charges:

COUNT ONE

JAMES "TOTTO" MARCHETTI, of Bridgeport in the District of Connecticut, on divers dates from on or about August 3, 1964, through on or about September 1, 1964, at Bridgeport, Connecticut in said District did engage in the business of accepting wagers as defined in 26 United States Code 4421, and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 United States Code 4401, having wilfully failed prior to engaging in said business and receiving said wagers to pay the special occupational tax as required by 26 United States Code 4411, due and owing the United States of America for the year ending June 30, 1965, in violation of Title 26, United States Code, Section 7203.

COUNT TWO

JAMES "TOTTO" MARCHETTI, of Bridgeport in the District of Connecticut, on divers dates from on or about August 3, 1964, through on or about September 1, 1964, at Bridgeport, Connecticut in said District did engage in the business of accepting wagers as defined in 26 United States Code 4421, and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 United States Code 4401, having wilfully failed prior to engaging in said business and receiving said wagers to

register as required by 26 United States Code 4412, in violation of Title 26, United States Code, Section 7203.

A TRUE BILL

.....

Foreman

/s/ F. OWEN EAGAN
F. Owen Eagan
United States Attorney

/s/ HOWARD T. OWENS, JR.
Howard T. Owens, Jr.
Assistant United States Attorney

Judgment and Commitment [No. 11,267]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

No. 11,267 Criminal

UNITED STATES OF AMERICA

v.

JAMES "TOTTO" MARCHETTI

On this 11th day of January, 1965, came the attorney for the government and the defendant appeared in person and[1] by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of violation of Title 18, Section 371 of the United States Code, (conspiracy to violate Title 26, Section 7203 of the United States Code), as charged[3] in count number one and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] one (1)

year. The defendant is required to pay a fine of TEN THOUSAND ($10,000) DOLLARS. This fine is to be a committed fine.

Execution of the sentence of imprisonment is stayed twenty-four hours.

~~It Is Adjudged that~~:[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WM. H. TIMBERS,
United States District Judge.

The Court recommends commitment to:[6]

.....,
Clerk.

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

Judgment and Commitment [No. 11,270]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

No. 11,270 Criminal

UNITED STATES OF AMERICA

v.

JAMES "TOTTO" MARCHETTI

On this 11th day of January, 1965, came the attorney for the government and the defendant appeared in person and[1] by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of violation of Title 26, Section 7203 of the United States Code, (person engaged in the business of accepting and receiving wagers failed to pay special occupational tax as required; and failed to register as required), as charged[3] in count numbers one and two and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] one (1)

year on count number one. The defendant is required to pay a fine of $10,000 on count number one. This fine is to be a committed fine. The sentence of imprisonment and the fine in this case are to run concurrently with the sentence imposed in Criminal Case No. 11,267.

Imposition of sentence is suspended on count number two and the defendant is to be placed on probation for a period of two years from the date of release from prison.

~~It Is Adjudged that~~:[5]

Execution of the sentence of imprisonment is stayed twenty-four hours.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

.....,

United States District Judge.

The Court recommends commitment to:[6]

.....,

Clerk.

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number ," if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

Partial Opinion in *U. S.* v. *Grassia*

The following is the relevant portion of the opinion of the Court of Appeals for the Second Circuit in *United States* v. *Grassia*, 354 F. 2d 27 (2 Cir. 1965).

FRIENDLY, *Circuit Judge*:

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States* v. *Costello*, 352 F. 2d 848 (2 Cir. 1965), *United States* v. *Piccioli*, 352 F. 2d 856 (2 Cir. 1965), and *United States* v. *Markis*, 352 F. 2d 860 (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceedings in January and February, 1965, prior to Grassia's change of plea,[1] see *United States* v. *Costello*, *supra*, 352 F. 2d at ——, *United States* v. *Piccioli*, *supra*, 352 F. 2d

[1] The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

——, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere,* as the Government concedes. But, so far as this Court is concerned, they have been determined adversely to Grassia by *United States* v. *Costello, supra,* 352 F. 2d 848. Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.